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JAMES H. McKEN

No. 243.

IN THE

SUPREME COURT

OF THE

UNITED STATES

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Plaintiff in Error,*

v.

EDGAR C. WILLIAMS, *Defendant in Error.*

In error to the Circuit Court of the United States for the Western Division of the Western Distrtict of Missouri.

ON CERTIFICATE FROM THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

EIGHTH CIRCUIT.

BRIEF OF DEFENDANT IN ERROR.

D. C. ALLEN,
SANDUSKY & SANDUSKY,
Attorneys for Defendant in Error.

Timothy J. Sullivan

No._____

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The question certified by the Circuit Court of Appeals reads as follows:

"Where the owner of cattle has the option

> to ship them to market at the same rate without free transportation for himself or his agents on the cattle train, to throw the entire responsibility of the care of the cattle during the transportation upon the railroad company, and to travel to the market town on a passenger train of that company for the regular fare, or to accept free transportation to the market town upon the cattle train which carries his cattle, to assume the responsibility of their care during the transportation, and to agree that the railroad company shall not be liable to him for any injury or damage which he sustains while he is being so carried, and without request, requirement or restraint he voluntarily chooses the latter alternative, is his contract that the railroad company shall not be liable to him for such injury or damage, valid?"

The question certified seems to be directly answered by the opinion of the Supreme Court of the United States in the leading case of

N. Y. C. R. Co. v. Lockwood, 17 Wallace, 357.

There can be no mistake as to what was decided in this case, for the court states the question presented thus:

> "The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage."

After an exhaustive discussion it was held that a common carrier cannot stipulate for exemption from respons-

ibility for its negligent injury to a *passenger for hire.*

And it was further held:

> "4. That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire."

The court in conclusion say:

> "We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a *free passenger*, instead of a *passenger for hire.*"

It has since been ruled that such stipulation is valid in case of a *free passenger.*

N. P. R. Co. v. Adams, 192 U. S., 439.

But in this last case the court expressly *recognizes* the *authority* of the Lockwood case.

In Liverpool Steam Co. v. Phœnix Ins. Co., 119 U. S., 397, Mr. Justice Gray, after giving an analysis of the opinion in the Lockwood case, says:

> "This analysis of the opinion in Railroad Co. v. Lockwood shows that it affirms and rests upon the doctrine that an express stipulation by any *common carrier for hire*, in a contract of carriage, that he shall be exempt from liability for losses caused by the negligence of himself, or his servants, is unreasonable and contrary to public policy, and consequently void. And such has always been the understanding of this court, expressed in several later cases."

And in B. & O. S. W. R'y Co. v. Voigt, 176 U. S., 505, the court, in distinguishing the Lockwood case, and stating the matter decided in that case, said:

> "This court held that a drover traveling on a pass, for the purpose of taking care of his stock on the train, is a *passenger for hire*, and that it is not lawful for a common carrier of *such passenger* to stipulate for exemption from responsibility for the negligence of himself or his servants. This case has been *frequently followed*, and it may be regarded as *establishing a settled rule of policy*."

It seems, then, to be clearly held by this court:

1st. That the owner of the cattle, under the facts assumed in the question certified, is a *passenger for hire*.

2nd. That a stipulation for exemption from liability for negligent injury to such passenger is invalid.

Looking at the question from the stand-point of reason:

Here is a written contract; this contract is a unit, and must be taken in its entirety; we cannot segregate the *clause* as to the *drover's transportation* from the *other mutual agreements*, and say that as to *this clause* there was *no consideration*.

The drover's transportation is, in the language of the Lockwood case, "one of the mutual terms of the arrangement for carrying the cattle."

This drover is not a mere licensee, riding by permission, for pleasure; he is *transacting business* with the railway company, out of which business the company

derives a profit; in the transaction of this business, and as a part of the arrangement, he stipulates to assume the care of the cattle during transportation, and thereby not only assumes an onerous burden, and relieves the company of this labor, but likewise relieves the company of liability for damage to the cattle growing out of want of proper care and attention.

From these facts the conclusion seems inevitable that the defendant in error was a *passenger for hire*. If so, the Lockwood case holds that the clause exempting the company from liability for negligently injuring him is invalid; and the Voigt case declares that the Lockwood case, in this ruling, "may be regarded as establishing a settled rule of policy."

The form of the question certified seems to indicate that the Circuit Court of Appeals had in mind the concluding remarks in the opinion of Mr. Justice Brewer in the Adams case.

That it was not the intention of the court, in the Adams case, to overthrow the "settled rule of policy" on this subject, established by prior cases, is clear from the fact that Mr. Justice Brewer, in his opinion, says:

> "He (Adams) was *not a passenger for hire*, such as was held to be the condition of the parties in the Lockwood and Stevens cases."

The written contract entered into by these parties cannot be shorn of its plain legal effect, because it was in the *power* of the *drover* to have *made some other contract*.

He is entitled to the protection of the law applicable

to the contract which he *did make*, and under which *both parties acted;* and it may be that he "voluntarily chose" to make this contract, because repeated decisions of the Supreme Court of the United States had established a "settled rule of policy" that the clause in this contract stipulating non-liability for negligence was invalid.

The Lockwood case does not rest upon the idea that technical *duress* was used in making the contract; what was said along this line was said *arguendo* upon the question of *public policy*.

The decision rests squarely upon reasons of public policy, among which the court states: that the employment of the common carrier is a public one, "charging him with the duty of accommodating the public in the line of his employment"; and that the "whole business community" is affected by the "individual contracts" he is permitted to make; and, in the language of the syllabus, "7. That *carefulness* and *fidelity* are *essential duties* of his *employment*, which *cannot be abdicated.*"

In addition to the authorities cited in the Lockwood case, the later authorities are collected in the able and elaborate brief filed in this cause, on behalf of defendant in error, by Messrs. Denison, Hipp and Talbot, the consideration of which is respectfully asked.

Respectfully submitted:

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